Supreme Court, U.S.
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No. 94-1752

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SHEILA YARBRO GARRETT, INDIVIDUALLY AND AS SURVIVING PARENT OF SHEILA NICOLE GARRETT AND NEXT FRIEND OF DONALD DONALDSON, A MINOR,
Petitioners,

v.

A.C. GILLESS, IN HIS OFFICIAL CAPACITY OF SHERIFF OF SHELBY COUNTY, AND SHELBY COUNTY, TENNESSEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit properly ruled that the failure of a sheriff to protect a spouse and child from harm from an off-duty deputy sheriff did not state a constitutional violation of either substantive due process or equal protection rights under the Fourteenth Amendment to the Constitution.

LIST OF PARTIES

Petitioner, Sheila Garrett, is an individual. She was also acting as the personal representative and surviving parent of her daughter, Sheila Nicole Garrett, a minor, and as next friend for her then minor son, Donald Donaldson.*

Respondent, A.C. Gilless, is the duly elected Sheriff of Shelby County, Tennessee. He was sued in his official capacity only.

Respondent, Shelby County, Tennessee, is a political subdivision of the State of Tennessee.

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* The Petitioners listed Blue Cross/Blue Shield as a party based upon its purported subrogation rights. That entity, however, was never served, was never named in the proceedings and never made an appearance before any court. Respondents do not believe that it was a party to the proceedings.

Table of Contents.

Question presented	i
List of parties	ii
Table of contents	iii
Table of authorities cited	iii
Opinions below	2
Statement of jurisdiction	2
Statement of the case	2
Reasons for denying the writ	4
I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. It merely challenges the Sixth Circuit's interpretation of the *DeShaney* and *Nishiyama* cases	4
II. Based upon the facts, the Sixth Circuit's holding that the Garretts' equal protection rights were not violated was correct	8
III. There is no basis for the Court to further define arbitrary government action	10
Conclusion	11

Table of Authorities Cited.

CASES.

Balistreri v. *Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988)	6
Bowers v. *DeVito*, 686 F.2d 616 (7th Cir. 1982)	6
Cellini v. *City of Sterling Heights*, 856 F.Supp. 1215 (E.D. Mich. 1994)	10

Collins v. *City of Harker Heights, Tex.*, 112 S.Ct. 1061 (1992) 9, 10

Cornelius v. *Town of Highland Lake*, 880 F.2d 348, *cert. denied*, 494 U.S. 1006 (1990) 7

DeShaney v. *Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) 4, 5, 6, 7, 8, 10

Freeman v. *Ferguson*, 911 F.2d 52 (8th Cir. 1990) 5, 6

Gibson v. *City of Chicago*, 910 F.2d 1422 (7th Cir. 1990) 6

Hynson v. *City of Chester*, 864 F.2d 1026 (3rd Cir. 1988) 9, 10

Nishiyama v. *Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987) 4, 5, 7

Russell v. *Steck*, 851 F.Supp. 859 (N.D. Ohio 1994) 6

Watson v. *Kansas City, Kan.*, 857 F.2d 690 (10th Cir. 1988) 9

STATUTES AND RULES.

United States Code

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 2
28 U.S.C. § 1331 2
28 U.S.C. § 1343 2
42 U.S.C. § 1983 2, 3

United States Constitution

Fourteenth Amendment i, 3, 8, 10

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TO THE HONORABLE SUPREME COURT:

The respondents, Sheriff A.C. Gilless and Shelby County, Tennessee, respectfully request that this Court deny the Petition for a Writ of Certiorari submitted by the petitioners, Sheila Yarbro Garrett and Donald Donaldson ("The Garretts").

OPINIONS BELOW

This case was brought in the United States District Court for the Western District of Tennessee pursuant to 42 U.S.C. 1983. A jury returned a verdict for the Garretts, and the Sheriff and County appealed to the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals, in a two to one decision, reversed the jury verdict and remanded the case for an order of dismissal. The appeals court's decision is unreported and is attached to the Petition for a Writ of Certiorari (A. A1-A13).

Following the Sixth Circuit's opinion, the Garretts moved for a rehearing *en banc*. That was denied, as was a rehearing, in an unreported order. The Court's order is attached to the Petition for a Writ of Certiorari (A. A14-A15).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 1291 as an appeal as a matter of right from a Final Judgment on a Jury Verdict in the District Court awarding damages to the Garretts.

The jurisdiction of the United States District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983, for alleged violations of the Garretts' rights under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Gene Garrett ("Gene") had been a deputy sheriff in the Shelby County Sheriff's Department since 1987. In 1989 he

was assigned to the Sheriff's narcotics unit and supplied with a light truck for use while on duty, as well as a service revolver. He also owned a personal gun.

Gene and his wife, Sheila Yarbro Garrett ("Sheila"), were estranged and separated by 1989. Over a period of months Sheila had called the Memphis Police Department for several incidents involving Gene, including a threat on her life and on the life of their daughter, Sheila Nicole Garrett ("Nikki"). The Sheriff's Internal Affairs Bureau ("I.A.B.") was notified of these incidents by the police. Except for an incident in Bartlett, Tennessee, where each filed assault charges against the other,[1] Sheila refused to file charges against Gene with either the Memphis Police Department or the I.A.B. The I.A.B. opened files for each of the incidents, but could take no further action because of Sheila's refusal to file charges.

On the night of Sunday, February 11, 1990, an off-duty Gene Garrett drove the Sheriff's truck to his estranged wife's house and broke down the door. With his personal gun in one hand and his service revolver in the other, he shot Sheila in the face, shot Donald Donaldson, Sheila's son and Gene's step son, in the neck, and shot and killed his daughter Nikki, before killing himself.

Sheila and Donald Donaldson brought an action for damages in the United States District Court for the Western District of Tennessee, pursuant to 42 U.S.C. § 1983. After a trial, the Court submitted the case to a jury on the defendants' violations of the plaintiffs' Fourteenth Amendment right to substantive due process and equal protection under the law. The jury returned a verdict for the Garretts. The Sheriff and County appealed to the United States Court of Appeals for the Sixth Circuit.

The Sixth Circuit, in a two to one unreported decision, reversed the jury verdict and remanded the matter to the District

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[1] Gene was free on bail on this charge, on February 11, 1990.

Court with instructions to dismiss the case. The appeals court held there was no special relationship between the Sheriff or the County and the Garretts, hence, under *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U.S. 189, 195-97 (1989), a substantive due process violation was not shown. The Sixth Circuit further distinguished its holding in *Nishiyama* v. *Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987), which the trial court relied upon in submitting the Garretts' case to the jury, by noting that the *Nishiyama* defendants "took affirmative action to provide the perpetrator with the opportunity and the freedom to commit the crime" (App. to Petition for Writ of Cert. at A6), which was not the situation in the matter *sub judice*. As to the equal protection claim, the Court held that a plaintiff must, in the first instance, show that there was an affirmative constitutional duty imposed upon the defendants to act. The "defendants [in this matter] were not under a constitutional duty to protect plaintiffs from violent acts committed by a private actor" (App. to Pet. for Writ of Cert. at A8), hence, no equal protection rights were violated.

The Garretts filed a petition for a rehearing, *en banc*. That was denied, as was a rehearing. A Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit was filed and is presently before this Court.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO ISSUE APPROPRIATE FOR THE COURT'S EXERCISE OF ITS DISCRETIONARY JURISDICTION. IT MERELY CHALLENGES THE SIXTH CIRCUIT'S INTERPRETATION OF THE *DeSHANEY* AND *NISHIYAMA* CASES.

The Garretts' petition fails to satisfy the traditional criteria applied by this Court in determining whether to grant a Writ of Certiorari. The Sixth Circuit properly applied *DeShaney*, and clearly distinguished, on a factual basis, the holding in *Nishiyama*. The Sixth Circuit's ruling was fact specific and hence, would present little precedential value.

The Garretts' first argument is that the Sixth Circuit's decision limits substantive due process violations to only custodial situations under *DeShaney*. They argue that the court should have applied an "increase the vulnerability" standard set out in *Freeman* v. *Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990).[2]

Various courts have found substantive due process violations in non-custodial situations. The hallmark of those cases is a finding of some affirmative action on the part of the state actor that adversely affected the plaintiff. In the case at bar, there was no action by the Sheriff or County that increased the Garretts' vulnerability; hence, there was no substantive due process violation under the standard the Garretts propose.

DeShaney v. *Winnebago Soc. Serv.*, *supra* at 197-98, in essence held that the Constitution is a charter of negative liberties — affirmative duties ordinarily do not exist under the due process clause. The Court specifically rejected the argu-

[2] This concept has been applied by many other courts under various names.

ment that someone, once in custody, created a continuing affirmative duty upon the State to protect that person against harm from private actors. Rather, the Court held that

> [t]he affirmative duty to protect arises not from the individual's predicament or from [the State's] expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 200, *DeShaney*, indicates that absent some affirmative action to limit another's freedom to act, no sustantive due process rights are triggered. Those courts finding substantive due process violations in non-custodial settings, limit their decisions only to situations where a "special relationship" was created. *See, Balistreri* v. *Pacifica Police Dept.*, 855 F.2d 1421, 1424, n.4 (9th Cir. 1988) for collected cases. Those cases trigger constitutional scrutiny only when the State, *by its actions*, created a danger that threatened the plaintiff's life or liberty. *See, Bowers* v. *DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("If the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit."). Thus, in *Freeman* v. *Ferguson*, *supra* at 55, the Court held that it might allow a substantive due process claim in a non-custodial setting "if the state has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action." *See also, Russell* v. *Steck*, 851 F.Supp. 859, 864 (N.D. Ohio 1994).

Gibson v. *City of Chicago*, 910 F.2d 1422 (7th Cir. 1990) is consistent with the above analysis. Chicago actively sought to limit the police officer's ability to officially act by finding him mentally unfit for duty and ordering him to turn in his

gun and ammunition. Once having undertaken a limitation of the police officer's unhampered freedom, Chicago was under an obligation to follow through. It failed to do so and the decedent was shot by the officer while off-duty with the gun and ammunition Chicago should have collected from him. The State actor thus undertook some affirmative action and then failed to follow through with its affirmative duties which, in turn, increased the plaintiff's vulnerability.

The Garretts present a list of facts claiming those were the requisite affirmative action of the defendants that took the matter outside *DeShaney*. Pet. for Writ of Cert. at 29-30. The Garretts' argument misapplies the *DeShaney* analysis by focusing on actions of the defendants. *See, DeShaney* v. *Winnebago Soc. Serv., supra*, dissent of Justice Brennan, at 204-05. The question the Sixth Circuit addressed was whether, in the first instance, there was a constitutional duty on the part of the Sheriff or County to protect the Garretts. It found there was no such constitutional duty. The Court then noted that, because neither the Sheriff nor County acted to protect the Garretts, there was no substantive due process claim presented. Pet. for Writ of Cert. App. at A6-A7. The gravamen of the Garretts' claim was, after all, that the Sheriff *did nothing* to protect them.

On the same basis, the Appeals Court correctly distinguished *Nishiyama* v. *Dickson County, Tenn., supra*. In *Nishiyama*, the defendants set in motion a series of events that gave the trusty prisoner both the means and "freedom to commit the crime." *Id.* at 281. The plaintiff was put in a unique "position of danger" by the defendants allowing the trusty his freedom and unsupervised use of the patrol car. *See, Cornelius* v. *Town of Highland Lake*, 880 F.2d 348 (11th Cir.), *cert. denied*, 494 U.S. 1006 (1990). There was affirmative action on the part of the defendants that increased the vulnerability of the plaintiff's decedent. There was no such affirmative action on the part of the defendants in the case *sub judice* — Gene was not

given his freedom or the means to commit the shootings by the Sheriff or the County.

The Garretts point to the fact that Gene used a Sheriff's vehicle to get to his estranged wife's house and his service revolver to commit the shootings. But, as the Sixth Circuit noted at A6-A7, Gene had other means of transportation available and his personal gun was in his other hand. Nothing the defendants did set in motion any action that led to the shootings. The defendants simply did not give Gene the means or the freedom to commit the shootings, he had those already. It would be sheer speculation to say that if Gene did not have the truck or a service revolver, the harm to the plaintiffs would not have occurred.

As Chief Justice Rehnquist noted in *DeShaney, supra* at 202-03, the facts before the Court are tragic, but the harm was not inflicted by the defendants and they should not be held liable because of the natural impulse to compensate the victims. The result may seem harsh, especially when others suffer while the government stands idly by, but a common law tort claim is not sufficient to state a constitutional violation under the Fourteenth Amendment.

The decision of the Sixth Circuit was correct. There was no constitutional duty requiring the defendants to protect the Garretts. Moreover, the proof failed to show any affirmative action by the defendants that placed the Garretts in a position of increased vulnerability. This case is not the proper vehicle to define the parameters of substantive due process violations in a non-custodial context, especially when there is nothing dictating an affirmative duty to protect on the part of the State. The defendants did nothing to create the danger from the private actor, nor did they do anything that enhanced the risk of harm to the plaintiffs.

II.

BASED UPON THE FACTS, THE SIXTH CIRCUIT'S HOLDING THAT THE GARRETTS' EQUAL PROTECTION RIGHTS WERE NOT VIOLATED WAS CORRECT.

The Garretts' second argument overdramatizes the appeals court's holding on the equal protection claim. The holding is not a tacit approval of domestic violence, but rather an application of time tested rules for finding constitutional violations. The decision neither condones nor encourages domestic violence — it simply recognizes the limitations of the Constitution.

The Garretts' argument rests upon a faulty assumption — that the defendants were under a constitutional duty to protect the plaintiffs from private violence. If the defendants were not under a constitutional duty to protect the Garretts, and if they did not act to protect them, their inaction should not trigger a constitutional inquiry. *See*, App. A7-A9.

The Garretts' argument suffers from the very thing the Court in *Collins* v. *City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1066 (1992) warned against — an assumption that a constitutional violation had been proved before focusing on the question of municipal liability. There was no constitutional violation in the first instance; hence, there could be no municipal liability. Absent a constitutional violation, liability issues are moot.

Watson v. *Kansas City, Kan.*, 857 F.2d 690, 694 (10th Cir. 1988) follows this reasoning. The Court noted there was no constitutional right to police protection; but, *if such protection was provided*, the police could not discriminate in providing it. Constitutional scrutiny is triggered only when there was a failure to fulfill an affirmative duty to act — not a failure to act when there was no constitutional duty to act.

The most often cited standard for equal protection claims in domestic abuse cases is set out in *Hynson* v. *City of Chester*, 864 F.2d 1026, 1031 (3d Cir. 1988). Relying upon *Watson*, *supra*, the court noted that to survive a summary judgment motion

> a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against the women was a motivating factor, and that the plaintiff was injured by the policy or custom.

On the facts, the Garretts' proof simply did not meet this standard.

Cellini v. *City of Sterling Heights*, 856 F.Supp. 1215 (E.D. Mich. 1994), is fact specific. The plaintiffs' proof in the case *sub judice* is distinguished because the I.A.B. did not act because Sheila never filed charges and set the I.A.B. investigatory processes in motion. Furthermore, the failure to act in Sheila's case did not satisfy the discrimination requirements set out in *Hynson* v. *City of Chester, supra*.

The Sixth Circuit's decision on the equal protection issue was correct. The Garretts present no issue that would call for this Court to exercise its discretionary review for further clarification.

III.

THERE IS NO BASIS FOR THE COURT TO FURTHER DEFINE ARBITRARY GOVERNMENT ACTION.

The Garretts' final argument is that the Court should use this matter to declare the boundaries of arbitrary government action. Petition for Writ of Certiorari, at 41-45. This case does not present the proper vehicle for such a declaration.

The Sixth Circuit's opinion was fact determinant. Its reasoning derived from the proof adduced at trial and the facts themselves limit any forays into unchartered areas of due process. *See, Collins* v. *City of Harker Heights, supra* at 1068. The Sixth Circuit's opinion rests on time tested Fourteenth Amendment standards and is in full agreement with the *DeShaney* holding. To extend substantive due process rights to situations where the State fails to protect another from private violence when it had no constitutional duty to protect, would create governmental liability for the failure to protect any victim from an assault by a private actor, without limit. The police, under our Constitution, are not the guarantors of citizens' freedom from *all* harm.

CONCLUSION

Respondents A.C. Gilless and Shelby County, Tennessee, request that the Petition for a Writ of Certiorari be denied because the case presents no issue appropriate for this Court's review, and because the Sixth Circuit's decision was not in error.

Respectfully submitted,

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